



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 10, 1993

Charles D. Travis
Executive Director
Employees Retirement System of Texas
18th and Brazos Streets
P.O. Box 13207
Austin, Texas 78711-3207

Letter Opinion No. 93-81

Re: Whether, under particular circumstances, a member of the Judicial Retirement System Plan One is entitled to receive the ten percent annuity increase described in section 834.102(b) of the Government Code (ID# 18361)

Dear Mr. Travis:

You have requested an opinion addressing the following question:

Is a member of the Judicial Retirement System of Texas Plan One eligible to receive the 10% annuity increase described in Section 834.102(b), Government Code, if the effective date of the member's retirement is one year or less from the date the member left a special judicial assignment rather than from the date the member left a judicial office to which the member was elected or appointed?

In 1978 this office concluded that the ten percent annuity increase was available only to judges who retire from office, not those who retire from special assignment. Attorney General Opinion H-1149 (1978) at 3. Since 1978, however, the legislature has amended the relevant statutes several times. You ask this office to reexamine the conclusion in Attorney General Opinion H-1149 in light of these amendments.

Section 834.102(b) of the Government Code currently states as follows:

The retirement system shall increase by 10 percent of the amount of the applicable state salary under Subsection (a) or (d), the annuity of a member who on the effective date of retirement has not been *out of judicial office* for more than one year.¹

¹At the time Attorney General Opinion H-1149 was issued, the relevant portion of V.T.C.S. article 6228b, section 2(a), one of the predecessors to section 834.102(b), read:

An additional ten percent (10%) of the applicable salary shall be added to the base retirement payments to the following judges: (1) those eligible for retirement under any provisions of this Act as amended who retire at or before age seventy (70); and (2) those who are not eligible by length of service to

(Emphasis and footnote added). In Attorney General Opinion H-1149, this office concluded that a former district judge on special assignment does not occupy a judicial office for the purposes of the statutory predecessor to section 834.102(b) of the Government Code. Therefore, any service a former judge accrues while on special assignment does not affect his or her eligibility for the additional ten percent benefit.

This office based Attorney General Opinion H-1149 in part on a reading of *Werlein v. Calvert*, 460 S.W.2d 398 (Tex. 1970), in which the Texas Supreme Court stated that a retired judge assigned to active duty does not, by virtue of the assignment, "hold an office that could become vacant upon termination of [the judge's] powers either by death or operation of law." *Werlein*, 460 S.W.2d at 401. Rather, according to the court, the judge may exercise the powers of an office only during the term of the assignment. *Id.* The *Werlein* court, in turn, cited the reasoning of the Supreme Court of California in *Pickens v. Johnson*, 267 P.2d 801 (Cal. 1954). The *Pickens* court stated that a retired judge assigned to active duty

has no power as a judicial officer until the happening of a contingency, namely, his assignment and voluntary acceptance [of an assignment]

That assignment does not prolong his term of office. It merely has the effect of vesting in him the powers of a judge . . . during the period specified in the assignment

Upon the expiration of the period of his assignment the judge resumes his prior status as a retired judge.

Pickens, 267 P.2d at 805-06. *Werlein* has not been overruled.

You note, however, that in 1984 the voters approved a proposal adding article V, section 1-a(6)(C) to the Texas Constitution. You state that article V, section 1-a(6)(C) "identifies a former judge on special assignment as a 'judicial officer.'" We consider, therefore, whether the addition of article V, section 1-a(6)(C) changes the result of Attorney General Opinion H-1149.

(footnote continued)

retirement benefits at age 70 but who retire immediately upon becoming eligible. However, the additional ten percent (10%) benefit shall not be paid to any judge who has been *out of office* for a period of longer than one (1) year at the time he applies for retirement benefits under this Act [Emphasis added.]

The language of this section was changed from "out of office" to "out of judicial office" in 1981 when article 6228b was incorporated into title 110B, V.T.C.S. See Acts 1981, 67th Leg., ch. 453, § 1, at 1878. The act was intended as a nonsubstantive revision. *Id.* § 4. Therefore, the change in this language does not change the result in Attorney General Opinion H-1149.

Article V, section 1-a(6)(C) of the constitution provides:

The law relating to the removal, discipline, suspension, or censure of a Justice or Judge of the courts established by this Constitution or created by the Legislature as provided in this Constitution applies to a master or magistrate appointed as provided by law to serve a trial court of this State and to a retired or former Judge who continues as a judicial officer subject to an assignment to sit on a court of this State. Under the law relating to the removal of an active Justice or Judge, the [State Judicial Qualifications] Commission and the review tribunal may prohibit a retired or former Judge from holding judicial office in the future or from sitting on a court of this State by assignment.

In our opinion, article V, section 1-a(6)(C) does not change the result of H-1149 but in fact reinforces our conclusion in that opinion. The legislature proposed adding article V, section 1-a(6)(C) to the constitution to clarify that a retired judge sitting by assignment is not exempt from discipline by the State Judicial Qualifications Commission. *See* Tex. Leg. Council, Information Report No. 84-1, at 5 (Aug. 1984) (stating that proposed article V, section 1-a(6)(C) "includes . . . retired or former judges subject to current assignment in the group of judicial officials subject to disciplinary action by the commission"). We do not believe that the legislature intended to make a retired judge sitting by assignment a judicial officer for purposes other than discipline. Indeed, the fact that the legislature found it necessary to amend the constitution to clarify that a retired judge holds a judicial office for disciplinary purposes underscores the fact that such a judge does not hold judicial office for any other purpose. Thus, a retired judge sitting by assignment is a judicial officer only for purposes of discipline; he or she is not a judicial officer in the context of section 834.102(b) of the Government Code. Accordingly, a special judicial assignment does not prolong a judge's term of office for purposes of section 834.102(b).² *See Pickens*, 267 P.2d at 805.

We note in addition that, since this office issued Attorney General Opinion H-1179 (1978), the legislature has codified and amended what is currently section 834.102(b) of the Government Code. None of those revisions affect that opinion's conclusion,

²We have been referred to Attorney General Opinion H-526 (1975) for the proposition that a judge sitting by special assignment is a judicial officer for purposes of section 834.102(b) of the Government Code. In Attorney General Opinion H-526 this office determined that a retired judge sitting by special assignment is a judicial officer for purposes of the financial disclosure provisions of article 6252-9b, V.T.C.S. Here, we determine whether a judge sitting by special assignment is a judicial officer for purposes of section 834.102(b) of the Government Code. We need not, therefore, apply the conclusion of Attorney General Opinion H-526 here.

however.³ Accordingly, a member of the Judicial Retirement System of Texas Plan One is ineligible to receive the ten percent annuity increase described in section 834.102(b) of the Government Code if the effective date of the member's retirement is one year or less from the date the member left a special assignment.

S U M M A R Y

Article V, section 1-a(6)(C) of the Texas Constitution makes a retired judge sitting by assignment a judicial officer only for disciplinary purposes; it does not make a retired judge sitting by assignment a judicial officer for purposes of section 834.102(b) of the Government Code. Accordingly, the addition of article V, section 1-a(6)(C) to the Texas Constitution does not affect this office's conclusion in Attorney General Opinion H-1149 (1978), which declared that the ten percent annuity increase section 834.102(b) of the Government Code provides is unavailable to judges who retire from special assignment. Thus, a former judge who is a member of the Judicial Retirement System of Texas Plan One is ineligible to receive the ten percent annuity increase described in section 834.102(b) if the effective date of the member's retirement is one year or less from the date the member left a special assignment.

Yours very truly,



Kymberly K. Oltrogge
Assistant Attorney General
Opinion Committee

³In addition to the nonsubstantive revision described *supra* in footnote 1, in 1987 the legislature amended the wording of former V.T.C.S. title 110B, section 44.102(b) (the predecessor statute of Gov't 834.102 renumbered in 1989) to, among other things irrelevant to the question before us, read affirmatively instead of negatively. See Acts 1987, 70th Leg., ch. 740, § 1, at 2656. In our opinion, this revision was nonsubstantive. By the same act, the legislature repealed section 44.102(c). See *id.* § 2, at 2656.